

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Gary F. Menne,

Complainant,

vs.

Ted Phillips,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS, AND
ORDER**

The above-entitled matter came on for an evidentiary hearing on January 26, 2007, before a panel of three Administrative Law Judges: Eric L. Lipman (Presiding Judge), Barbara L. Neilson, and Jennifer Patterson. The hearing record closed at the conclusion of the hearing that day.

Gary F. Menne, 5311 264th St., Wyoming, MN 55092, participated on his own behalf without counsel.

Frederic Knaak, Knaak and Kantrud, P.A., 3500 Willow Lake Blvd., Suite 800, St. Paul, MN 55110, represented the Respondent, Ted Phillips.

NOTICE

This is the final decision in this case, as provided in Minn. Stat. § 211B.36, subd. 5. A party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

STATEMENT OF ISSUES

Did Respondent violate Minn. Stat. § 211B.07 by threatening force, coercion, violence, restraint, damage, harm, loss, including loss of employment or economic reprisal, or undue influence to compel voters to vote for him, or against the Complainant, in the November 7, 2006, general election?

The panel concludes that the Complainant has established by a preponderance of the evidence that the Respondent violated Minnesota Statutes § 211B.07.

Based upon the entire record, the panel makes the following:

FINDINGS OF FACT

1. In 2006, three candidates filed for two seats on the Wyoming City Council: Gary F. Menne, Ted Phillips, and Joe Zerwas. Both Mr. Phillips and Mr. Zerwas were incumbent candidates. Mr. Phillips and Mr. Zerwas were first elected to the Wyoming City Council in 2002.¹

2. Sheldon Anderson was the incumbent candidate for Mayor of Wyoming. Mr. Anderson ran unopposed in 2006.

3. Prior to the November 7, 2006, general election, Mr. Phillips prepared a campaign flyer that listed negative “facts” about Mr. Menne. The heading of the flyer stated, “THE MANY FACTS ABOUT GARY MENNE.” Under the heading, Mr. Phillips stated the following:

Fact #1 – Mr. Menne for three years has NOT paid his water/sewer bill with the City of Wyoming and now owes over \$2900.00 to US. Question? – Is this the type of person YOU want running OUR city? Someone that feels he is above the rest of US.

Fact #2 – Mr. Menne has his property newly listed with Welsh Properties for sale. Question? – Doesn’t this show he has NO commitment to the CITIZEN’S of Wyoming for which he is supposed to support?

Fact #3 – Attached you will see Mr. Menne’s issues when it comes to doing business as a person in Wyoming. He has many judgments against him, which will tell you that we ALL may have to pay the price for his poor decisions he makes while on council.

NOW you have a choice – Take down the sign in your yard and tell your neighbors that you NO longer support Mr. Menne for the facts listed above. The only way to avoid Mr. Menne getting into office is to vote for the incumbents – ANDERSON – PHILLIPS – ZERWAS. If you don’t remove the sign and still believe in Mr. Menne than you must believe in cheating the rest of US in the city and that will not go unnoticed in the future. THANK YOU.²

4. Mr. Phillips attached eight sheets to the flyer that listed judgments and liens filed against Mr. Menne personally or against his business, Gary F. Menne and Son Inc., as well as UCC filings made by Menne and Son Inc. with several local banks. Mr. Phillips believed that Mr. Menne did not deserve election to the Council and that it was important for the voters to have this information.³

¹ Testimony of Phillips and J. Zerwas.

² Ex. M (emphasis in original).

³ Testimony of Phillips.

5. Mr. Phillips prepared and disseminated the flyer without the knowledge or approval of Mr. Anderson or Mr. Zerwas.⁴

6. On Saturday, November 4, 2006, Mr. Phillips placed the flyer in the newspaper boxes of persons who had posted lawn signs in their yards in support of Mr. Menne's candidacy. Mr. Phillips disseminated approximately 90 copies of the flyer.⁵

7. Mr. Phillips did not include on the flyer any information identifying himself as the author. He disseminated the flyer and its attachments anonymously.⁶

8. Mr. Anderson had a lawn sign in support of Mr. Menne's candidacy on his front lawn.⁷

9. On Sunday, November 5, 2006, Mr. Anderson found a copy of the campaign flyer in his newspaper box. Throughout that day, Mr. Anderson received numerous telephone calls from Wyoming citizens who had received the flyer and were upset by it. Many of the callers asked why Mr. Anderson had put out such a flyer. Mr. Anderson explained to these callers that he had nothing to do with the flyer. He also told the callers that he was supporting Mr. Menne's candidacy and not Mr. Phillips' candidacy, in the upcoming election.⁸

10. Mr. Anderson viewed the alleged facts in the flyer and the attachments to be "politics," but he found the last statement in the flyer to be objectionable. Mr. Anderson read the flyer's last sentence as threatening those residents of Wyoming who had openly expressed a preference for Mr. Menne's candidacy.⁹

11. After he received the flyer, Mr. Anderson called Mr. Phillips and asked him if he was responsible for the flyer. Mr. Phillips admitted that he was responsible for the flyer and he apologized for using Mr. Anderson's name on the flyer without first obtaining Mr. Anderson's permission. Mr. Anderson told Mr. Phillips that he was disappointed in him.¹⁰

12. Like Mr. Anderson, Mr. Zerwas supported Gary Menne's candidacy and had posted a lawn sign in support of Mr. Menne on his front lawn.¹¹

13. Mr. Zerwas was away from home deer hunting the weekend before the election. On Sunday morning, November 5, 2006, his wife found the

⁴ Testimony of S. Anderson and J. Zerwas; Exs. A and B.

⁵ Testimony of Phillips.

⁶ Testimony of Phillips.

⁷ Testimony of Anderson.

⁸ Testimony of Anderson.

⁹ Testimony of Anderson.

¹⁰ Testimony of Anderson.

¹¹ Testimony of J. Zerwas.

campaign flyer in their newspaper box. Mrs. Zerwas felt threatened by the flyer. She read the flyer to mean that if she did not remove her lawn sign in support of Mr. Menne, “there would be consequences.” While Mrs. Zerwas is not easily intimidated and she did not personally feel physically threatened by the flyer, she did worry that someone might damage their property if the Menne lawn sign was not removed. In addition, she was upset that her husband’s name was on a flyer that she believed threatened voters.¹²

14. On Sunday, November 5, 2006, Mrs. Zerwas received several telephone calls from Wyoming citizens who had received the flyer and were upset by it. The people who called her, told her that they felt threatened by the flyer. She assured the callers that her husband was not involved with producing the flyer.¹³

15. Mr. Zerwas returned home from his hunting trip on Monday, November 6, 2006. His wife showed him the flyer and told him about the telephone calls she had received from local residents. Mr. Zerwas interpreted the last paragraph of the flyer to threaten voters who had lawn signs in support of Mr. Menne. Mr. Zerwas was upset that his name had been used on the flyer without his permission, and that people assumed that he was responsible for, or associated with, the flyer. In addition, he expressed concern that the flyer would confuse voters because it implied that he supported Mr. Phillip’s candidacy, when in fact he supported Mr. Menne.¹⁴

16. Mr. Zerwas called Mr. Anderson about the flyer. Mr. Anderson told Mr. Zerwas that Mr. Phillips had created the flyer and had put it in the newspaper boxes of homes that had lawn signs in support of Mr. Menne.¹⁵

17. On Monday, November 6, 2006, Mr. Zerwas received several telephone calls from Wyoming citizens who were upset about what they considered to be the “threatening nature” of the flyer. Several persons commented to Mr. Zerwas that they were not going to let anyone threaten them into taking down their lawn sign.¹⁶

18. Although Mr. Zerwas did not feel personally threatened by the flyer, he believed the last paragraph was intended to scare voters who supported Mr. Menne.¹⁷

19. Frank Pechaver is a Wyoming resident who received the campaign flyer in his newspaper box. He and his wife had a lawn sign in support of Mr. Menne’s candidacy on their front lawn. Mr. Pechaver found the flyer to be very

¹² Testimony of L. Zerwas.

¹³ Testimony of L. Zerwas.

¹⁴ Testimony of J. Zerwas; Ex. B.

¹⁵ Testimony of J. Zerwas.

¹⁶ Testimony of J. Zerwas.

¹⁷ Testimony of J. Zerwas; Ex. B.

intimidating and threatening. Mr. Pechaver understood the flyer to mean that the three Council members (Anderson, Phillips and Zerwas) were going to come after him for having a Gary Menne sign in his yard and that he also would be watched if he did not remove that sign from his yard. Following their receipt of the flyer, Mr. Pechaver's wife urged him to remove the Menne lawn sign from their yard. Mr. Pechaver, however, insisted that they not remove the sign. He told his wife that he was not going to be intimidated.¹⁸

20. Howard Toronto, an elderly Wyoming resident who supported Mr. Menne's candidacy and had one of his lawn signs in his yard, also received the flyer. Mr. Toronto called the police to file a report about the flyer. He complained to the police officer that he felt threatened by the flyer's directive that he take down his lawn sign.¹⁹

21. There is no evidence in the record that anyone removed their lawn sign or changed their vote as a result of having received the campaign flyer.

22. In the November 7, 2006, election for Wyoming City Council, Mr. Zerwas received 1009 votes, Mr. Menne received 712 votes, and Mr. Phillips received 677 votes.

23. On November 20, 2006, Gary Menne filed this complaint alleging that Mr. Phillips violated Minnesota Statutes §§ 211B.02 (false claim of support), 211B.04 (improper disclaimer), 211B.06 (false campaign material) and 211B.07 (undue influence on voters) in preparing and disseminating the campaign flyer.

24. On November 27, 2006, Presiding Administrative Law Judge Eric L. Lipman determined that the Complaint set forth a *prima facie* violation of Minnesota Statute § 211B.07, but dismissed the other allegations.

25. Since his defeat in the general election and the swearing in of the new City Council, Mr. Phillips has attended and video-taped the Wyoming City Council meetings.²⁰

Based upon the foregoing Findings of Fact, the panel makes the following:

CONCLUSIONS

1. Minn. Stat. § 211B.35 authorizes the panel of Administrative Law Judges to consider this matter.

2. Minn. Stat. § 211B.07 provides, in part, as follows:

A person may not directly or indirectly use or threaten force, coercion, violence, restraint, damage, harm, loss, including loss of

¹⁸ Testimony of Pechaver.

¹⁹ Ex. O.

²⁰ Testimony of J. Zerwas and Anderson.

employment or economic reprisal, undue influence, or temporal or spiritual injury against an individual to compel the individual to vote for or against a candidate or ballot question. * * *

3. The burden of proving the allegations in the complaint is on the Complainant. The standard of proof of a violation of Minn. Stat. § 211B.07 is a preponderance of the evidence.²¹

4. The Complainant has demonstrated that the Respondent threatened coercion, harm, loss, reprisal, or undue influence to compel individuals to vote for him or against Mr. Menne.

5. The violation was committed deliberately, but the threat was vague, diffuse, and had no or minimal impact on the voters. The Respondent shall be fined \$600 for the violation.

Based upon the record herein, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

ORDER

IT IS ORDERED:

That having been found to have violated Minn. Stat. § 211B.07, Respondent Ted Phillips pay a civil penalty of \$600 by March 15, 2007.²²

Dated: February 9, 2007

s/Eric L. Lipman
ERIC L. LIPMAN
Presiding Administrative Law Judge

s/Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

s/Jennifer Patterson
JENNIFER PATTERSON
Administrative Law Judge

²¹ Minn. Stat. § 211B.32, subd. 4.

²² The check should be made payable to "Treasurer, State of Minnesota" and sent to the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, Minneapolis, MN 55401.

MEMORANDUM

Minnesota Statutes § 211B.07 prohibits undue influence on voters and provides, in part:

A person may not directly or indirectly use or threaten force, coercion, violence, restraint, damage, harm, loss, including loss of employment or economic reprisal, undue influence, or temporal or spiritual injury against an individual to compel the individual to vote for or against a candidate or ballot question. . . .

The record established that during the weekend before the 2006 general election, Mr. Phillips placed flyers that he had prepared in the newspaper boxes of persons who had posted lawn signs in their yards in support of his opponent, Mr. Menne. The final paragraph of the flyer stated:

NOW you have a choice – Take down the sign in your yard and tell your neighbors that you NO longer support Mr. Menne for the facts listed above. The only way to avoid Mr. Menne getting into office is to vote for the incumbents – ANDERSON – PHILLIPS – ZERWAS. If you don't remove the sign and still believe in Mr. Menne than you must believe in cheating the rest of US in the city and that will not go unnoticed in the future. THANK YOU.²³

The issue before the panel is whether the language of Mr. Phillips' flyer constitutes a threat of coercion, harm, loss, reprisal, or undue influence made to compel voters to vote for Mr. Phillips and against Mr. Menne.

Several witnesses testified that they found the flyer to be threatening and that they understood the last sentence to mean that if they did not remove their lawn sign, there would be reprisals.²⁴ For example, Mr. Perchaver interpreted the flyer to mean that the incumbent city council members (Anderson, Phillips, and Zerwas) were watching him and would "come after him" if he did not remove his Menne lawn sign. According to Mr. Pechevar, his wife was also intimidated by the flyer and she urged him to remove the Menne sign from their lawn.

The Respondent, Mr. Phillips, denied any intent to threaten voters. Mr. Phillips testified that he meant only to communicate that if Mr. Menne were elected, Mr. Menne's performance would "not go unnoticed."²⁵ The Respondent contends that his subsequent video-taping of the City Council meetings supports this interpretation and demonstrates his efforts to "[hold Mr. Menne] to task to do things the right way."²⁶

The panel concludes that the Respondent's purported construction of the flyer is not plausible. A few points deserve special emphasis.

²³ Ex. M (emphasis in original).

²⁴ Testimony of L. Zerwas.

²⁵ Testimony of T. Phillips.

²⁶ *Id.*

First, Mr. Phillips' suggested reading of the flyer is at odds with the words that he chose. Not only is the flyer text particularly hostile to Mr. Menne's supporters, demanding withdrawal of their lawn signs and characterizing the holdouts as "cheaters," none of the words in the flyer suggest that Mr. Menne is the person that is slated for later scrutiny. Instead, when read in context, it is evident that the last sentence is directed at the readers of the flyer and that it is their actions that will not go unnoticed; not the performance of Mr. Menne. Only by selectively skipping over whole phrases, can one come to Mr. Phillips' preferred reading: namely, "if you elect Mr. Menne, I will watch him."

Second, the facts surrounding the distribution of the flyer likewise cut against Mr. Phillips' claim that he was merely offering to hold Mr. Menne accountable during a later City Council term. The evening arrival of an unsigned and unattributed flyer in the newspaper boxes of only those who hosted a Gary Menne lawn sign, with the further demand that these persons publicly renounce their support for the challenger and support the incumbent office-holders, are not the hallmarks of a public-spirited observer of city politics.²⁷

Third, although the phrase "if you don't remove the sign and still believe in Mr. Menne then you must believe in cheating the rest of US in the city and that will not go unnoticed in the future," is imprecise, the panel concludes it is sufficiently definite to communicate a threat of coercion, harm, loss or reprisal to compel voters to vote for Mr. Phillips or against Mr. Menne. While the exact nature of the threat was not clearly stated, the fact that the flyer urged support for the three sitting members of the Council suggests the possibility that some type of official acts of reprisal might be taken if the flyer's directive is not followed.

Fourth, contrary to the Respondent's contentions, the statute does not require that the proscribed threats be separately punishable as crimes before any sanction may follow. Importantly, Section 211B.07 includes prohibitions that are both broader and different than the conduct that is proscribed by Minnesota's coercion or terroristic threats statutes, found in the criminal law.²⁸ Moreover, the application of parallel civil remedies for threats made to induce voting has been a feature of Minnesota's civil law for 80 years – without any importing of the rules of criminal procedure.²⁹ Because this proceeding is not a criminal prosecution, but an administrative proceeding, the standard of proof for an alleged violation of Section 211B.07 is a preponderance of the evidence.³⁰

Lastly, while there is no evidence in the record that anyone removed their lawn sign, or changed their vote, as a result of having received Mr. Phillips' flyer, such a showing is not necessary in order to establish a violation of the statute. The panel concludes that the Complainant need only show that the threat was

²⁷ Compare, *Fritz v. Hanfler*, 263 N.W.2d 910, 911-12 (Minn. 1935) (chairman of county emergency relief board's statements to voters during campaign that if they did not support him, their relief payments would end, violated the predecessor statute prohibiting coercion of voters.)

²⁸ Compare, e.g., Minn. Stat. §§ 609.27, 609.713 (2006).

²⁹ See, *Fritz v. Hanfler*, 263 N.W.2d at 911 (citing 1 Mason Minn. St. 1927, § 548).

³⁰ Compare also, *Riley v. Jankowski*, 713 N.W.2d 379, 391 (Minn. App. 2006), rev. denied (Minn. July 19, 2006).

made for the purpose of compelling individuals to vote in a particular manner; not that it was ultimately effective. The reason is plain. Minn. Stat. § 211B.07 is meant to safeguard voters, like Mr. Perchaver, from worrying about what reprisals may follow from their choice of Council candidates and lawn sign. It does not first require a change of heart.

The Complainant has established by a preponderance of the evidence that, by preparing and disseminating the flyer, Mr. Phillips threatened voters in an attempt to coerce them to vote for him in violation of Minn. Stat. § 211B.07.

The Respondent also argued that Minn. Stat. § 211B.07 unconstitutionally infringes on his First Amendment right of free speech. As noted in the panel's prior Order denying Respondent's motion for summary disposition,³¹ the state may properly regulate and circumscribe categories of speech, such as "fighting words" or "true threats," without violating the First Amendment.³² It appears that the Minnesota Legislature was operating within its rightful police powers when it enacted Section 211B.07, by punishing speech that threatens "force, coercion, violence, restraint, damage, harm, loss, including loss of employment or economic reprisal ... [or] undue influence"³³ In any event, a facial challenge to the constitutionality of the statute is beyond the scope of this hearing; because such challenges are within the exclusive province of the judicial branch to resolve.³⁴ For this reason, the Respondent's constitutional claims are duly noted for the record and preserved for possible appeal.

E.L.L., B.L.N., J.P.

³¹ See, *Menne v. Phillips*, OAH Docket No. 8-6312-17667-CV (Order dated January 23, 2007).

³² See, *Dunham v. Roer*, 708 N.W.2d 552, 565 (Minn. 2006) (citing, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-83 (1992)).

³³ Compare, Minn. Stat. § 211B.07 (2006) with *Dunham*, 708 N.W.2d at 565 ("True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals ..." [and a] statute that is narrowly tailored to ban or regulate unprotected words of conduct, such as "fighting words" or "true threats" does not implicate the First Amendment ..."); compare also, *United States v. Bellrichard*, 62 F.3d 1046, 1050 (8th Cir. 1995) ("the First Amendment affords no protection to those who utter direct threats of force and violence toward other persons").

³⁴ See, *Neeland v. Clearwater Memorial Hospital*, 257 N.W.2d 366, 369 (Minn.1977); *In re Rochester Ambulance Service*, 500 N.W.2d 495, 499-500 (Minn. App. 1993).